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November 16, 2018

**Via Hand Delivery**

Lora W. Johnson, CMC, LMMC  
Clerk of Council  
Room 1E09, City Hall  
1300 Perdido Street  
New Orleans, LA 70112

**Re: Rulemaking Proceeding to Consider the Process for How Any Future Requests for Proposals for Generating Resources or Purchase Power Agreements Issued By Entergy New Orleans, LLC Shall Be Conducted CNO Docket No. UD-18-05**

Dear Ms. Johnson:

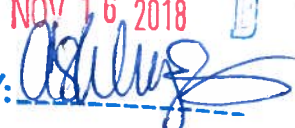
Enclosed for your further handling please find an original and three copies of Entergy New Orleans, LLC's ("ENO") Reply Comments on the Council's of the City of New Orleans' Rulemaking Concerning Future Requests for Proposals for Generating Resources or Purchase Power Agreements in connection with the above-referenced matter. Please file an original and two copies into the record and return a date-stamped copy to our courier.

Should you have any questions, please do not hesitate to contact me. Thank you in advance for your usual courtesy and assistance with this matter.

Sincerely,

  
Harry M. Barton

HMB/bkd  
Enclosures  
cc: Official Service List

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**BEFORE THE  
COUNCIL OF THE CITY OF NEW ORLEANS**

***IN RE: RULEMAKING PROCEEDING*     )  
*TO CONSIDER THE PROCESS FOR*     )  
*HOW ANY FUTURE REQUESTS FOR*     )  
*PROPOSALS FOR GENERATING*        )  
*RESOURCES OR PURCHASE POWER*    )  
*AGREEMENTS ISSUED BY ENTERGY*    )  
*NEW ORLEANS, LLC SHALL BE*  
*CONDUCTED***

**DOCKET NO. UD-18-05**

**ENTERGY NEW ORLEANS, LLC’S REPLY COMMENTS ON  
THE COUNCIL OF THE CITY OF NEW ORLEANS’ RULEMAKING  
CONCERNING FUTURE REQUESTS FOR PROPOSALS  
FOR GENERATING RESOURCES OR PURCHASE POWER AGREEMENTS**

Entergy New Orleans, LLC (“ENO” or the “Company”) submits its Reply Comments on the Council of the City of New Orleans’ (the “Council”) Rulemaking Concerning Future Requests for Proposals (“RFPs”) for Generating Resources or Purchase Power Agreements (“PPAs”). ENO submits these Reply Comments pursuant to the procedural schedule set forth in Council Resolution No. R-18-335 (the “Resolution”) and in response to comments filed by Air Products and Chemicals, Inc. (“APC”) and the Alliance for Affordable Energy (“AAE”) (collectively, the “Intervenors”), as well as the AAE’s Reply Comments of November 15, 2018.

In its initial Comments, ENO expressed enthusiasm for the Council’s judicious use of its regulatory authority to open this proceeding and consider ways in which ENO, along with its System Planning and Operations group (“SPO”), could improve the manner in which ENO administers and conducts RFPs for generation resources, as well as ways in which procedures for Council oversight and stakeholder engagement could be improved and perhaps formalized in rules. ENO believes, and stated in its initial Comments, that rules focused on creating a collaborative framework that fosters communication, enables transparency, and maintains flexibility for future RFPs can be beneficial to ENO, its customers, and all stakeholders. ENO is

encouraged by many of the suggestions from Intervenors that seem to share the goal of creating rules designed to achieve these ends and will discuss these areas of consensus herein.

However, ENO is concerned that some suggestions from the Intervenors advocate for rigid substantive and procedural rules that would apply to all RFPs in the same manner, thus precluding flexibility and limiting ENO's ability to design RFPs to yield optimal solutions to its specific needs, and those of its customers, in a timely manner.<sup>1</sup> These suggestions, which include requiring "all source" solicitations in all instances, limiting ENO's ability to craft the scope of RFPs, and requiring that the Council select an Independent Monitor ("IM"), would detract from the Council's objectives of creating efficient RFP processes designed to meet the specific needs of New Orleans, ENO, and its customers. Rules of this nature would also hamper ENO's ability to use its expertise and business judgment to fulfill its resource planning obligations to provide reliable electric service to its customers while minimizing costs and risks. ENO agrees that the Council's oversight of ENO's execution of these duties is important, but the responsibility for fulfilling these objectives rests solely with ENO. ENO strongly urges that any rules adopted by the Council in this proceeding allow ENO the discretion and flexibility to use its business judgment and expertise when designing RFPs and selecting the resources necessary to fulfill its obligations to customers.

#### **I. The Council's Role in Overseeing ENO's Procurement Processes.**

Prior to addressing substantive issues related to proposed rules for the Council's oversight of ENO's RFP processes and resource procurement decisions, ENO seeks to provide clarity on a concept initially raised in the AAE's Comments – regulatory jurisdiction. The

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<sup>1</sup> The AAE should not be viewed as a "neutral" party in this proceeding. The AAE represents the interests of, and accepts financial contributions from, entities that could bid into future RFPs. Although it may be that nothing prohibits the AAE from advocating for these companies' interests, the fact that certain of the RFP rules proposed by the AAE stand to benefit its donors directly, and the AAE indirectly, should not be overlooked.

AAE's Comments cite to a Council Resolution in support of the AAE's conclusion that "there should be no question of the authority of the City Council resolving to supervise and direct ENO's procurement of new resources."<sup>2</sup> The AAE goes on to cite to various statutes and orders, including the Louisiana Public Service Commission's ("LPSC") Market Based Mechanisms Order ("MBMO"),<sup>3</sup> in its discussion of the Council's authority. However, the AAE's conclusions of law regarding the Council's jurisdiction raise two very different concepts: (i) the authority to "supervise" ENO's procurement processes; and (ii) the authority to "direct" those processes. ENO agrees that no question exists as to the Council's authority to review ENO's performance of business functions, like resource planning; such oversight is properly within the scope of the authority vested in the Council by the Home Rule Charter. The AAE's statement that the Council's authority as ENO's regulator includes the power to "direct" ENO's procurement of generating resources, however, is an inaccurate representation – one which cuts to the core of many areas of disagreement between ENO and the Intervenors, discussed below. Well-established jurisprudence, and the MBMO to which the AAE cites, both provide abundant clarification on the distinction between (i) the Council's authority to supervise ENO's resource procurement processes and review the prudence of ENO's resource selections and (ii) the idea advanced by the AAE that the Council can and should "direct" ENO's business decisions about resource procurement. ENO will briefly summarize this body of law and discuss its application to some of the issues raised by Intervenors.

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<sup>2</sup> AAE Comments at pg. 2, citing Resolution No. R-18-355. ENO notes that the cited Resolution is not the source of the Council's regulatory authority and cannot function to augment or diminish that authority. *See*, Home Rule Charter of the City of New Orleans ("Home Rule Charter"), Article III, Section 3-130(9)).

<sup>3</sup> General Order, Docket No. R-26172 Subdocket A, *In re: Development of Market-Based Mechanisms to Evaluate Proposals to Construct or Acquire Generating Capacity to Meeting Native Load*, Supplements the September 20, 1983 General Order, dated February 16, 2004 (as amended by General Order, Docket No. R-26172 Subdocket B, dated November 3, 2006, and further amended by the April 26, 2007 General Order, and the amendments approved by the Commission at its October 15, 2008 Business and Executive Meeting and now in General Order, Docket No. R-26172, Subdocket C dated October 29, 2008). [Available for viewing here](#).

### **A. Legal Precedent on the Breadth, and Limits, of Regulatory Authority.**

The AAE correctly notes that the Louisiana State Constitution establishes the authority of the LPSC to “regulate all common carriers and public utilities and have such other regulatory authority as provided by law,” and to “adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law.”<sup>4</sup> However, Article 21 of the Louisiana State Constitution expressly excludes regulation of utilities, like ENO, that are regulated by political subdivisions of Louisiana from Article 21’s scope and the LPSC’s jurisdiction.<sup>5</sup> Unlike the LPSC, the Council’s regulatory authority is provided for and outlined in the Home Rule Charter.<sup>6</sup> Regardless of this distinction, the Home Rule Charter vests the Council with authority similar to that bestowed upon the LPSC and referenced by the AAE, including the ability to set rates, establish procedural schedules, allocate funds and benefits, impose reasonable penalties, and other powers enumerated in the Home Rule Charter.<sup>7</sup> Retail regulators of utilities across the United States are vested with similar powers via similar statutory schemes. However, courts

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<sup>4</sup> La. Const. Ann. art. IV, § 21(B), (West 2018).

<sup>5</sup> La. Const. Ann. art. IV, § 21(C), (West 2018) (“The commission shall have no power to regulate any common carrier or public utility owned, operated, or regulated on the effective date of this constitution by the governing authority of one or more political subdivisions, except by the approval of a majority of the electors voting in an election held for that purpose; however, a political subdivision may reinvest itself with such regulatory power in the manner in which it was surrendered. This Paragraph shall not apply to safety regulations pertaining to the operation of such utilities.”). Similarly, the Louisiana Revised Statutes cited by the AAE expressly exempt the Council and Orleans Parish from their scope. *See* La. Rev. Stat. Ann. § 45:1164(A-B) (West 2018). (“The power, authority, and duties of the commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by such public utility, except in the parish of Orleans.”).

<sup>6</sup> Home Rule Charter Article III, Section 3-130(1) (“The Council of the City of New Orleans shall have all powers of supervision, regulation, and control consistent with the maximum permissible exercise of the City’s home rule authority and the Constitution of the State of Louisiana and shall be subject to all constitutional restrictions over any street railroad, electric, gas, heat, power, waterworks, and other public utility providing service within the City of New Orleans including, but not limited to the New Orleans Public Service, Inc. and the Louisiana Power and Light Company, their successors or assigns.”).

<sup>7</sup> *Id.* at Sections 3-130(2-8).

have consistently held these powers are not without limit and do not extend into making managerial or business decisions for utilities.

The United States Supreme Court articulated the basic premise of this limit on regulatory authority over utilities nearly a century ago, stating “It must never be forgotten that, while the state may regulate with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership.”<sup>8</sup> Numerous decisions have followed the Supreme Court’s pronouncement on these limits and have held that public service commissions must restrict their actions to regulation and avoid interfering with a public utility’s managerial or business decisions.<sup>9</sup>

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<sup>8</sup> *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276, 289 (1923). The Supreme Court’s focus on ownership of property is telling. For municipally-owned and operated utilities, regulators exercise a greater degree of control over managerial decisions. They also bear a greater degree of responsibility for the effects of such decisions.

<sup>9</sup> See, e.g., *Emporium Water Co. v. Pennsylvania Pub. Serv. Util. Comm’n*, 955 A.2d 456 (Pa. 2008) (“As a general matter, utility management is in the hands of the utility and the [Commission] may not interfere with lawful management decisions...”); *Consumers Power Co. v. Pub. Serv. Comm’n*, 596 N.W.2d 126 (Mich. 1999) (reversing a commission order requiring a utility to engage in “retail wheeling,” reasoning that “absent specific legislative authority, the commission can encourage a specific management decision through the exercise of its ratemaking power, but it may not directly order the utility to make the decision.”); *Public Serv. Co. v. State ex rel. Corp. Comm’n*, 918 P.2d 733, 740 (Okla. 1996) (order requiring that certain costs be passed directly to customers and not absorbed by the utility is unconstitutional as “[i]t would give the Corporation Commission authority it does not otherwise have in that it interferes with the internal management decisions of the [utility]”); *Pennsylvania Pub. Util. Comm’n v. Philadelphia Elec. Co.*, 561 A.2d 1224 (Pa. 1989) (“Although the Commission is a watchdog for the public and against unreasonable rates, the Commission must not interfere with managerial decisions of a utility absent an abuse of discretion.”); *In re Mountain States Telephone and Telegraph Co.*, 745 P.2d 563 (Wyo. 1987) (“[The commission] is not in a position to take on any aspect of utility management. It must restrict its position to ‘regulation’ with management decisions being entirely that of the utility.”); *Pac. Power & Light Co. v. Pub. Serv. Comm’n*, 677 P.2d 799, 810 (Wyo. 1984) (Rose, J. specially concurring) (“Not only is the participation by a state agency in a utility’s business decisions unnecessary to regulation, it is impermissible.”); *Alabama Power Co. v. Alabama Pub. Serv. Comm’n*, 359 So.2d 776, 780 (Ala.1978) (“Although subject to regulation by the government, a utility, like any corporation, should be allowed to operate consistent with the free enterprise system to the extent possible. ... The function of the Alabama Public Service Commission is that of regulation, and not of management. The Commission should not be allowed to interfere with the proper operation of the utility as a business concern by usurping managerial prerogatives.”); *In re Consumers Power Co.*, 14 P.U.R. 4th (Mich. P.S.C. March 8, 1976) (“The prudent investment theory has over the ensuing years been refined and expanded upon to stand for the principle that it is improper for a regulatory agency charged with the responsibility to establish just and reasonable rates to assume the management of a regulated entity under the guise of rate making.”); *Pub. Serv. Comm’n v. Ely Light &*

Such managerial decisions include the selection of parties with whom regulated utilities seek to enter contracts following RFPs and the terms of such agreements. In *Union Telephone Company v. Wyoming Public Service Commission*, the Wyoming Supreme Court reversed a commission decision as “unlawful meddling.”<sup>10</sup> There, the Wyoming Public Service Commission had ordered a telecommunication company (US West) to upgrade its telephone exchanges. Rather than upgrade 27 of these exchanges, however, US West chose to sell them. After a bidding process, two companies contracted to purchase the exchanges, but a third company intervened in the commission proceeding seeking to acquire one of the exchanges. The commission ultimately ordered that US West sell the exchange at issue to the intervening company, instead of the party chosen from the utility’s bidding process. The Supreme Court of Wyoming reversed, finding the commission exceeded its authority:

The PSC is not authorized to meddle in the private sector’s contractual affairs.... The PSC’s order granting Silver Star a conditional certificate of public convenience and necessity must be reversed as unlawful meddling. The PSC had no statutory authority to order US West to negotiate with Silver Star. The order is, therefore, arbitrary and capricious. The heavy-handed regulation practiced by the PSC in this case is not to be favored in an increasingly competitive telecommunications industry.<sup>11</sup>

The Circuit Court for the District of Columbia has also held that similar restrictions apply to the Federal Energy Regulatory Commission’s authority, opining that dictating “the choice of CEO, COO, and the method of contracting for services, labor, office space, [etc.]” would very clearly exceed the Commission’s authority.<sup>12</sup>

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*Power Co.*, 393 P.2d 305 (Nev. 1964) (“It is the commission’s duty to regulate rates but not to manage the utility’s business.”); *Petition of New England Tel. & Tel. Co.*, 66 A.2d 135 (Vt. 1949) (“The function of a public service commission is that of control and not of management, and regulation should not obtrude itself into the place of management. This rule is recognized in all of the cases.”).

<sup>10</sup> 910 P.2d 1362 (Wyo. 1996).

<sup>11</sup> *Id.* at 1365.

<sup>12</sup> *California Indep. Sys. Operator Corp. v. F.E.R.C.*, 372 F.3d 395, 403–04 (D.C. Cir. 2004)

In citing and summarizing this authority, ENO does not assert that the Council is without authority to regulate ENO's procurement processes and decisions. Rather, ENO feels compelled to remind the Council and Intervenors that regulation of those processes does not extend to making managerial decisions on ENO's behalf such as designing the scope of RFPs and selecting resources from them. ENO is the only entity held responsible for planning to meet its customers' needs and must be afforded the discretion to make managerial decisions necessary to do so. A helpful analogy may be to think of a medical licensing board's regulation of a physician. A physician is responsible for diagnosing a patient's condition, identifying an appropriate course of treatment, and performing the selected procedures. While a medical licensing board regulates the accreditation of the physician and exercises regulatory authority to determine whether the procedure was properly selected and performed, that regulatory body will not tell the physician which procedure is best for the patient or perform the procedure in the physician's stead. Similarly, the Council is well within its authority to review ENO's decisions for prudence and adopt rules related to oversight, public participation, required communications, the timing of notices for RFPs, etc., but a century's worth of judicial precedents clearly provide that managerial and business decisions related resource planning are ENO's to make.

#### **B. The LPSC's MBMO**

The AAE points to the LPSC's MBMO as an example of proper and prudent regulation of the resource procurement process. Examining this Order and the history of its development illustrates adherence to the distinction between a regulator "supervising" and "directing" such processes. ENO agrees with the AAE that if the Council uses its authority to adopt rules like those contained in the MBMO, such actions would be well within the scope of the Council's jurisdiction and fulfill the objectives the Resolution describes for this proceeding.



Several excerpts in the MBMO clearly indicate that the Order properly views conducting, designing, and administering RFPs as a business function that should be managed, or “directed,” by the utility. The Order states that “[t]he **electric utility shall conduct *its* planning and RFP process** with the objective being provision of reliable electric service at lowest reasonable cost,” clearly acknowledging that conducting the RFP is a utility function.<sup>13</sup> The Order also requires that a utility submit an informational filing to the LPSC detailing several items, including:

- “The **utility’s** proposed schedule for conducting and completing its RFP process and resource acquisition process;”
- “A description of the methods and criteria that **the utility** intends to use to evaluate RFP bid responses;”
- “[A] description of how **the utility** intends to incorporate transmission issues into its bid evaluation process;”
- “A description of the methods and safeguards **the utility** will use to protect confidentiality of bids and bidder information and to ensure such information is not improperly used by the utility or its affiliates nor provides to a utility’s merchant affiliate;” and
- “[A] description of the methods and safeguards **the utility** will use to ensure the utility’s merchant affiliate bid receives no preferential treatment, preferential access to information or unfair or improper advantage.”<sup>14</sup>

Upon the submission of this, and other, information, the Order requires the utility to conduct a technical conference with the Commission Staff and stakeholders, and states that “the electric utility may proceed with the RFP process after completion of a consultation process.”<sup>15</sup>

Noticeably absent from the MBMO are any overly prescriptive restrictions around the design or scope of any RFP, any requirement that all RFPs adhere to the same set of milestones or schedules, or any requirement that the pre-RFP process be resolved, like a litigated proceeding,

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<sup>13</sup> See MBMO, Ordering Paragraph 11. Emphasis added.

<sup>14</sup> *Id.* at Paragraph 8. Emphasis added.

<sup>15</sup> *Id.* at Ordering Paragraph 9.

with a final order from the Commission prior to issuance of the RFP.<sup>16</sup> Rather, the MBMO's requirements are focused on providing an opportunity for review, analysis, and comment on the design of RFPs, while maintaining the flexibility necessary for the process to move efficiently and not have issuance of RFPs delayed by rigid requirements and lengthy proceedings.

Several policy statements the LPSC made when adopting the MBMO also warrant consideration and speak to the merits of comments raised by the Intervenors. These statements, which reinforce the need for rules that create a flexible, informational, and collaborative process that provides the utility with discretion to make supply planning decisions, include the following:

- “Staff’s proposed rule does not dictate the specific methodology by which bids and utility self-build proposals are to be evaluated (other than the traditional standard of reliable service at lowest reasonable cost).”<sup>17</sup>
- “We believe this process provides both the structure and use of the wholesale market sought by parties, ... while at the same time **preserving to the utilities their traditional responsibility for supply planning and acquisition.**” *Id.* at pg. 6. Emphasis added.
- “The proposed Rule rejects the concept suggested by several parties that an independent third-party entity be retained by the Commission to either conduct the RFP or evaluate results and submit a recommendation. This is not necessary and could be counterproductive.” *Id.*
- “With respect to the Independent Monitor option, Staff recommended that if an independent monitor was selected, that the independent monitor fees be paid for with bid fees, to be capped at \$5,000 per bid.” *Id.* at pg. 9.

ENO believes that if the Council adopts rules that adhere to similar conventions and policy goals as those outlined above from the MBMO, which the AAE’s Comments seem to endorse, such rules will allow for fulfillment of the objective stated in the Resolution.

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<sup>16</sup> On this last point, the LPSC specifically considered and rejected the idea that the RFP oversight process should be conducted like a docketed or litigated proceeding. *See* General Order, Docket No. R-26172 Subdocket A, *In re: Development of Market-Based Mechanisms to Evaluate Proposals to Construct or Acquire Generating Capacity to Meeting Native Load*, Supplements the September 20, 1983 General Order, dated February 16, 2004, (“February 2004 MBMO”) at pg. 5 of 14. (“[T]he process is one of technical review and consultation concerning the utility’s proposal rather than litigation.”). *See also* Appendix B of the February 2004 MBMO, at pg. 9. (“Under the current framework, the utility’s draft RFP package is an informational filing and is not part of a docketed RFP. Staff continues to support this arrangement **since docketing the RFP could lead to unnecessary litigation, additional costs, and delay in conducting the RFP.**”) (Emphasis added).

<sup>17</sup> *See* February 2004 MBMO, at pg. 4.

## II. Areas of General Agreement Among ENO and the Intervenors.

As noted above, ENO generally agrees with many of the suggestions the Intervenors set forth related to rules that the Council may choose to adopt for future RFPs. In fact, as demonstrated in ENO's initial Comments, many of these suggestions were put into practice for the 2016 Renewables RFP. The areas of agreement center on creating a process that allows for Council supervision of, and stakeholder participation in, ENO's RFP processes as well as creating a flexible and adaptable framework therefor. Prior to discussing areas where ENO has fundamental differences of opinion from the Intervenors, ENO will briefly summarize and, as necessary, caveat the topics where consensus seems possible. These areas of agreement include:

**Notices, Schedules and Milestones:** ENO agrees with the suggestions of APC and the AAE that the utility should provide the Council with notices of upcoming RFPs,<sup>18</sup> a schedule of expected milestones for future RFPs, and notices of any anticipated changes to the milestone dates provided, so long as appropriate measures are in place to protect confidentiality of negotiations when schedule updates are provided. ENO also has no objection to having these schedules and milestones being posted on any website the Council may eventually create for utility matters and notes that ENO already publishes schedules on its own website.<sup>19</sup> ENO does not believe that the Council should establish the same timeline for all RFPs in the Council's rules and instead advocates that the rules allow for flexibility, as different timelines will be appropriate for different RFPs. The Council and stakeholders would have an opportunity to review and provide input on all aspects of ENO's future RFPs, including the proposed timelines.

**Contents of RFP Documents:** ENO generally agrees with several of the recommendations that Intervenors make about what kind of information should be included in the RFP documents and informational filings related thereto, including (i) a description of the need to be met, (ii) a general description of the criteria used to evaluate bids, including "non-price" factors, (iii) a link to the most recent Integrated Resource Plan ("IRP") documents, (iv) a description of any requirements or preferences for transmission arrangements and deliverability, including a description of how transmission issues will be incorporated into bid

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<sup>18</sup> The MBMO requires that notice be provided 30 days in advance of the informational filing described above.

<sup>19</sup> The AAE Comments objected to materials for the 2016 Renewables RFP being hosted on a site maintained by SPO and suggests the Council rules should adopt a requirement related to the entity that maintains the site hosting RFP materials. The AAE's objection is without merit as the 2016 Renewables RFP materials were, and are, publicly available regardless of the business decision to follow Company protocol and post the materials on an SPO website. Further, such a rule would typify the type of micromanagement from a regulator that courts disfavor. That said, the AAE Reply Comments appear to endorse the practice ENO and SPO employed for the 2016 Renewables RFP in this regard. *See* AAE Reply Comments at pg. 3.

evaluations,<sup>20</sup> (v) information about the requirements of resources sought, including dispatchability requirements, (vi) draft term sheets to inform potential contract negotiations, and (vii) a draft confidentiality agreement to be used for the process. ENO cautions that the Council's rules should generally describe the kinds of information to be contained in RFP documents and not adopt overly prescriptive, substantive requirements applicable to the contents of those documents for all RFPs. ENO discusses this issue further in the next section of these Reply Comments.

**Independent Monitor:** ENO agrees with Intervenors that an IM should be engaged for all RFPs where a self-build option will be submitted and, as the Council knows, ENO followed this practice for the 2016 Renewables RFP. ENO also generally agrees that the IM should report to the Council, Advisors, and any designated Council staff at certain milestones during the RFP process, provided appropriate confidentiality measures are in place to preserve the integrity of negotiations.<sup>21</sup> ENO notes that the IM is, by design, involved with reviewing the draft RFP, reviewing public comments and questions, and assessing the methods of evaluating proposals, thus fulfilling Intervenors' recommendations in this regard. ENO also agrees that the Council should designate an Advisor and/or other staff member to be the point of contact with the IM for the Council.

Despite this general agreement about the role and duties of the IM, ENO fundamentally disagrees with the suggestion that the Council should issue an RFP for, select, and hire the IM. ENO believes that such a requirement would materially detract from the Council's goal of creating efficient and expeditious RFP processes due to the onerous requirements the Council must follow when hiring consultants.<sup>22</sup> Indeed, the Council's hiring of a consultant to perform a Demand Side Management Study for the IRP process took several months to complete and resulted in a six month delay in the procedural schedule for that Docket, which delay may in turn jeopardize the Council's timely approval of Program Year 10 of Energy Smart. ENO also notes that the LPSC considered and rejected this idea. Instead, the LPSC opted to require the utility to select the IM and retain the right to reject the utility's choice of

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<sup>20</sup> ENO objects to the AAE's suggestion that the utility would need to estimate and provide transmission costs for resources located in different geographic areas. That kind of requirement would be unnecessarily burdensome and would not provide any value to ENO, RFP participants, or customers since transmission costs are highly dependent on the specific type and location of a resource. For these and other reasons, industry practice is that bidders prepare transmission cost estimates by working with the Midcontinent Independent System Operator ("MISO"), or the appropriate Regional Transmission Organization, and submit those cost estimates as part of their proposals.

<sup>21</sup> ENO disagrees with the AAE's proposal that the IM should publicly file these reports and post them on a website, for the reasons clearly articulated in ENO's initial Comments. Moreover, given that ENO will eventually file any IM report with the application for approval of resources selected, ENO questions the value of filing an interim IM report during the RFP process. The risks of such a practice disrupting the process and compromising negotiations are very real and far outweigh any benefit that Intervenors have attempted to articulate.

<sup>22</sup> Similarly, ENO objects to APC's suggestion that the IM have had no affiliation with any Entergy Corporation affiliate for ten years. APC provides no justification for this vast departure from industry standard (the MBMO's similar requirement is limited to three years). Such needlessly onerous requirements would impede the efficiency of all future RFPs. ENO also objects to the five-year proposal in the AAE's Reply Comments, which the AAE admits is only offered up "in order to find some middle ground with APC." Three years is sufficient.

IM as described and proposed in ENO's initial comments.<sup>23</sup> The AAE's Reply Comments also appear to indicate receptiveness to a similar process of ENO selecting the IM, subject Council oversight.<sup>24</sup>

**Pre-RFP Issuance Technical Conference:** As noted in its initial Comments, ENO believes that a technical conference prior to the issuance of an RFP is appropriate and followed this protocol for the 2016 Renewables RFP. The AAE's Reply Comments endorse following a similar process in future RFPs.<sup>25</sup> As such, ENO agrees with the Intervenor's comments in this regard. ENO notes that its initial Comments cautioned against the requirement for any type of Council order to resolve any disagreements that may linger after the technical conference, as such a requirement would delay issuance of the RFP significantly, detracting from the Council's goal of creating an efficient process. As noted above, the LPSC considered and rejected such a requirement when adopting the MBMO.

**Additional Self-Build Protections:** ENO agrees with Intervenor's suggestions related to the separation of the evaluation team from the team that developed any self-build options, as well as the anonymization of self-build proposals from other submissions. ENO strictly followed this type of protocol for the 2016 Renewables RFP, as documented in the IM's Final Report. The AAE's Reply Comments express support for continuation of these practices. *Id.*

**Diverse Suppliers:** ENO and the AAE agree on the importance of creating opportunities for diverse suppliers. ENO is pleased to see that the AAE's Reply Comments appear to recognize that the specific requirements from Article IV of Chapter 70 of the Code of the City of New Orleans do not necessarily apply to ENO and that ENO's supplier diversity policies provide an acceptable means for achieving this goal. The AAE recommends memorializing ENO's supplier diversity policies and practices in any rules adopted in this proceeding. ENO has no objection to this concept, but advocates that any such rule should provide the flexibility for ENO to periodically update its supplier diversity policy to keep pace with best industry practices.

ENO is encouraged by the many areas in which the Intervenor and ENO appear to agree on what the Council's rules should address and believes that if the rules are drafted with flexibility, transparency, and efficiency of process in mind, a viable framework will result.

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<sup>23</sup> See February 2004 MBMO, at pg. 10 of 14 and current MBMO at Ordering Paragraph 15. ENO also notes, as cited above, that the LPSC decided in 2004 that a bidder fee cap of \$5,000 was appropriate and should be used to cover the IM's fees. The AAE's suggested cap of \$1,000 is far below industry standards – even 14 years ago – and would risk customers being required to fund a greater portion of the IM's fees than necessary. No credible reason exists to justify the AAE's arbitrary recommendation.

<sup>24</sup> See AAE Reply Comments at pg. 4.

<sup>25</sup> *Id.* at pg. 5.

**III. Certain of the Intervenors' Recommendations are not Appropriate for ENO or the Scope of this Proceeding and Would Undermine the Council's Goals.**

Despite the many areas of agreement described above, ENO believes that a few of the suggestions posited by Intervenors would undermine the goals the Council set forth for future RFPs in the Resolution. These suggestions include the AAE's proposal of requiring an "all source" solicitation for every RFP regardless of circumstances, and APC's suggestion of adopting overly prescriptive, substantive requirements related to the scope of all future RFPs. These proposed requirements would not result in an optimal process for future RFPs. The AAE also suggests that any rules the Council adopts for RFPs for generation resources or PPAs, should also apply to all "large capital expenditures" undertaken by ENO. Not only does this last suggestion greatly exceed the scope of the notice provided for in the instant proceeding, it would turn the regulatory paradigm under which ENO and the Council operate on its head and greatly impede ENO's ability to run its business, serve its customers, and achieve Council policy goals.

**A. The "All Source" Solicitations Requirement is not Supported by the AAE's Own Materials and is not Appropriate for ENO.**

In support of the proposal that the Council's rules require ENO to conduct "all source" solicitations, regardless of the particular circumstances facing ENO at any given time, the AAE recycles the testimony provided by Philip Henderson in Docket No. UD-16-02. However, this testimony articulates several reasons why the AAE's proposal, and the statutory schemes from other states to which the AAE cites, are not appropriate for ENO. The AAE's witness correctly notes that, "[t]here also may be legitimate reasons a utility or utility regulator might determine to not use a competitive procurement process in certain instances. Small procurements, procurements by small utilities, or procurements with very tight requirements, for example,

could warrant different treatment.”<sup>26</sup> ENO fully agrees with the AAE’s witness that “all source” solicitations are likely not a good fit for small utilities with unique, or tight, requirements; both circumstances apply to ENO.

ENO is certainly a small utility as compared to the examples the AAE’s Comments and supporting materials reference. Indeed, the California solicitations described in the AAE’s materials sought to identify “1000 to 1500 MW of power from clean resources,” in one instance and “between 1,400 and 1,800 MW” in another.<sup>27</sup> Either one of those solicitations would eclipse the total amount of capacity required to serve ENO’s entire customer load, much less what ENO would seek in any given RFP. As the AAE’s witness acknowledges, a procedure designed for such massive, state-wide solicitations is likely not appropriate for a utility of ENO’s size.

The second circumstance the AAE’s witness identifies as rendering “all source” solicitations ineffective also applies to ENO. As the Council knows, ENO’s unique geographic location (surrounded by water on three sides and located at the end of the electric grid) presents unique challenges, or “very tight requirements,” for resource planning. ENO’s supply planners, however, have decades of experience in creating solutions to meet these unique challenges and, as such, can design RFPs to target the specific needs of ENO’s system. However, rather than allow ENO to utilize that expertise to make managerial decisions about designing targeted RFPs, which is a specific goal articulated in the Resolution,<sup>28</sup> the AAE proposes to require ENO to open every RFP to all comers and then spend time and money evaluating resource proposals that may not be targeted to ENO’s specific needs. While this kind of paradigm may work for utilities

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<sup>26</sup> See AAE Comments, Appendix A, pg. 10, (emphasis added).

<sup>27</sup> See AAE Comments, Appendix B, pg. 1.

<sup>28</sup> See Resolution No. R-18-355 at 7. (Identifying the design of RFPS that “target[] the specific power supply, reliability or other system needs that would be met by acquiring those resources” as a Council priority.).

that do not face the unique planning challenges presented to ENO, imposing such requirements on ENO would not benefit ENO or its customers, a fact which the AAE's own witness concedes.

The universal "all source" solicitation requirement also undercuts the purpose, and limits the effectiveness, of the Council's recently-revised IRP rules.<sup>29</sup> The AAE Comments acknowledge that the purpose of the IRP is to provide a "clear and precise understanding of the needs of New Orleans" and state that "the utility should use the IRP to provide an assessment of actual needs (reliability, capacity, resilience, etc.) that will eventually be resolved with resources through a competitive process."<sup>30</sup> ENO agrees and believes the new IRP rules can foster such outcomes, but notes a contradiction in the AAE's Comments. The IRP process allows ENO to fairly evaluate a broad range of resources and then hone in on the specific kinds of resources that can meet the specific needs identified through that process in an optimal manner. As such, conducting a solicitation that is open to resources that the IRP may have eliminated from consideration as viable solutions seems to take a step backward in terms of resource planning. The Council, the Advisors, ENO, and stakeholders devoted the better part of a year to creating an IRP framework that would inform resource planning decisions; the RFP rules should not undermine those efforts or undo that progress.

The AAE's own materials and arguments demonstrate that the "all source" framework is likely not the best fit for ENO. But the AAE's proposal ultimately suffers because it seeks to make this kind of solicitation mandatory, or the default option, for all future RFPs. The Council's RFP rules should allow for flexibility, collaboration, and the exercise of prudent

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<sup>29</sup> The AAE's witness also opines that an "all source" solicitation process could "compliment the Council's current IRP process;" yet reviewing his testimony closely indicates he examined the IRP framework set forth in Resolution No. R-13-363. *See* AAE Comments, Appendix A at 11-12 and fn. 2. This is despite the fact that the testimony was filed three months after the Council adopted new IRP rules in Resolution No. R-17-332. The AAE's witness does not appear to have considered the current IRP process at all.

<sup>30</sup> *See* AAE Comments at pg.6.



discretion by ENO's resource planners.<sup>31</sup> If the IRP process, coupled with ENO's own managerial decisions about the needs of its system, demonstrates that a situation may be appropriate for an "all source" solicitation, then ENO should be free to employ one. However, the Council rules should not mandate the use of such a process in every instance for the sole purpose of giving the AAE "greater confidence in [ENO's] resource selection."<sup>32</sup>

**B. APC's Recommendations Contain Many Overly-Prescriptive, Substantive Restrictions that are not Suited to Procedural Rules for Council Oversight of Resource Planning.**

ENO's initial Comments and the previous sections of these Reply Comments devote much discussion to the importance of rules that allow for flexibility and the exercise of ENO's best professional and managerial judgment in a given situation. APC's Comments contain many proposals that would unnecessarily restrict such discretion. For example, APC's Comments state that the Council should limit the scope of every single RFP to stating a capacity amount and not allow the consideration of specific needs like location, technology type, fuel source, or project structure.<sup>33</sup> If ENO determines based on expertise regarding its unique circumstances that consideration of any of these particular factors is important for meeting ENO's needs at a given time, then the rules should provide enough flexibility to allow such determinations to inform the scope of the RFP.<sup>34</sup> Rules like those proposed by APC would be overly prescriptive, eliminate

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<sup>31</sup> The AAE witness acknowledges the value of this expertise in several instances. *See* AAE Comments, Appendix A at pg. 6 ("The distribution utility typically has the expertise and responsibility to identify and select the appropriate resources for procurement."). *See also, id.* at pg. 9. ("The distribution utility is likely to be the best party to evaluate proposals, to accord weight to different attributes of resource alternatives, and to exercise judgment required to select an appropriate resource or mix of resources to procure.").

<sup>32</sup> *See* AAE Comments at 4, describing the sole benefit of the AAE's proposal that may be applicable to New Orleans.

<sup>33</sup> *See* APC Comments at pg. 3.

<sup>34</sup> ENO notes that the AAE's Reply Comments also appear to endorse rules that would afford ENO the flexibility and discretion to "outline as clearly as possible the need the RFP seeks to fill" when drafting RFPs. *See* AAE Reply Comments at pg. 4.

flexibility, and impinge on ENO's ability to make decisions about the scope of RFPs. Such rules would also undermine the Council's goal of designing of RFPs that "target[] the specific power supply, reliability or other system needs that would be met by acquiring those resources."<sup>35</sup>

**C. The AAE's Suggestion to Apply Rules from this Proceeding to All Capital Investments is Misplaced, Unnecessary, and Procedurally Unsupportable.**

The AAE Comments suggest that the rules adopted from this proceeding related to RFPs for generating resources or PPAs should apply to all "large capital expenditures." The AAE attempts to justify this unreasonable suggestion in two ways. First, the AAE falsely claims that no regulatory process existed to provide assurances that ENO's investment in Advanced Metering Infrastructure ("AMI") (an investment the AAE fully supported), "was contracted at a fair market price," or would best meet the needs of New Orleans. Second, the AAE cites to statements from ENO's other filings about the rapidly changing utility industry and ENO's need to work with the Council to develop flexible regulatory frameworks (which frameworks will be essential to ENO's continued ability to meet its customers' needs and remain viable as a business) to argue for more restrictive regulations that would hinder flexibility and limit ENO's ability to successfully evolve its business to meet changing customer needs. ENO will address each argument in turn, but will first address a fatal procedural flaw in the AAE's proposal.

The Resolution issued a notice of rulemaking on a very specific topic, "the process for how any requests for proposals for generating resources or purchase power agreements issued by Entergy New Orleans, LLC shall be conducted."<sup>36</sup> That notice, and the procedural schedule set forth in the Resolution, purport to establish a framework to help ensure that ENO is afforded due process of law prior to any regulations affecting its privately-owned property being imposed. The

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<sup>35</sup> See Resolution No. R-18-355 at 7.

<sup>36</sup> See Resolution No. R-18-355 at Ordering Paragraph 1. Emphasis added.

AAE's proposed rules would greatly exceed the scope of the notice of rulemaking contained in the Resolution. As such, the adoption of any regulations along the lines of what the AAE is suggesting would create serious due process of law issues for the outcome of this proceeding. That issue alone provides enough justification for rejecting the AAE's proposal. However, ENO will also address the lack of merit of the AAE's substantive arguments.

In support of their proposal, the AAE falsely claims that no procedural mechanisms existed for transparently evaluating ENO's proposal to invest in AMI or for ensuring that ENO's investment in AMI and related services was contracted for at a fair market price. The AAE participated in Docket No. UD-16-04, supported ENO's proposal submitted therein, and, thus, knows or should know that the narrative advanced in its Comments lacks any basis in fact. The Direct Testimony of Rodney W. Griffith described in detail the RFP conducted for ENO's AMI investment, stating that the AMI team "followed the Company's standard vendor selection process for large capital programs, which included initial market research; a competitive RFP process; detailed bid evaluation; oral presentations from selected vendors; and a detailed contract negotiation process to establish clear and fair commercial terms and vendor performance expectations."<sup>37</sup> ENO followed this process, in part, to be able to demonstrate to the Council, upon filing of its application, that ENO had selected the best AMI technology and service providers for New Orleans and that ENO's investments therein would be contracted for at a fair market price. The Council established a procedural schedule that allowed for a thorough review of ENO's proposed investment, including the RFP process, results thereof, and selections therefrom. Throughout this process, the Advisors propounded voluminous discovery requests,

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<sup>37</sup> See Direct Testimony of Rodney W. Griffith, submitted in Docket No. UD-16-04, October 2016, at pg. 13. Mr. Griffith also described the managerial decision making that went into designing the scope of and requirements for the RFPs.

thoroughly evaluated ENO's proposed investment, and ultimately concluded that ENO's proposal "is in the public interest, serves the public convenience and necessity, and is therefore prudent."<sup>38</sup> During this same process, the AAE submitted four pages of substantive commentary into the record and supported ENO's proposed investment – not once expressing concern about ENO's choice of technology or the cost of the investment.<sup>39</sup> Yet now, over two years after ENO filed its application, the AAE complains of lacking transparency and procedural mechanisms for evaluating ENO's investment decisions. These complaints lack any basis in reality.

The AAE's Comments imply that the only way to achieve "transparency" and "certainty" about the prudence of ENO's decisions related to capital investments is for the AAE to insert itself into ENO's managerial process before applications are filed, before vendors are selected, before technology is assessed, and before ENO enters into contracts for services. This is simply not how the regulatory paradigm under which ENO and the Council operate works. In the course and scope of operating its business, ENO contracts for services, invests capital, evaluates technology, and makes managerial decisions about these activities on a daily basis. The Home Rule Charter provides the Council with a myriad of options for overseeing ENO's execution of these duties, including: the ability to institute prudence reviews, initiate show cause proceedings, and, most significantly, the ability to set rates and make determinations as to whether ENO's capital investments and operating costs are eligible for recovery from customers. This framework allows ENO the flexibility and discretion to operate its business and provides assurance to customers, through the Council's oversight, that they are receiving quality service at

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<sup>38</sup> See Resolution No. R-18-37, Attachment 1 at pg. 2.

<sup>39</sup> It should be noted that a primary theme in the AAE's four-page commentary was the baseless assertion that ENO had moved too slowly in seeking to adopt AMI technology. However, had ENO been subjected to the kind of procedural requirements that the AAE's Comments seek to impose prior to making managerial decisions about its investment in AMI, ENO's investment in and deployment of that technology would have been unduly delayed.

the lowest reasonable cost and only paying for investments that inure to their benefit. If, as the AAE suggests, ENO were required to conduct public conferences, consult with intervenors, and follow a host of other requirements before making any managerial decisions or capital investments, ENO's ability to provide service to its customers and function as a viable business would grind to a halt. Regardless of whether that outcome is the AAE's goal, the goal of its member organizations and corporate sponsors, or an unintended consequence of a well-meaning suggestion, it is not an outcome that will benefit New Orleans' residents.

The AAE also implies that the only way to provide adequate oversight of ENO's investments in Grid Modernization, Demand-Side Management ("DSM"), renewable resources, distributed-energy resources ("DERs"), and other emerging technologies is for the Council to require that whatever process results from this proceeding be followed before ENO can make investments in those technologies. This position is somewhat confusing given the AAE's frequent advocacy for increasing investment in these technologies at an accelerated pace.<sup>40</sup> However, the AAE's stated concerns in this regard lack merit. ENO has not sought, and will not seek, a "blank check" from the Council to invest in any of these technologies; all of these future investments are, and will be subject to, regulatory oversight from the Council. It is true that ENO has petitioned the Council, in the 2018 Base Rate case and other proceedings, for flexible mechanisms through which such oversight can be conducted. ENO advocates, and will continue to advocate, for adoption of these innovative regulatory paradigms because the rapid evolution of technology will require ENO to be increasingly agile in order to best serve its customers and communities and remain viable as a business. But each of ENO's proposed regulatory

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<sup>40</sup> It bears considering the possibility that the AAE's goals are not limited to seeing increased investments in renewables, DERS, and DSM, but also seeking policies to help ensure that investments in those technologies are made in ways that benefit their corporate sponsors and member organizations.

frameworks provides for stakeholder input, public access to information, technical consultation with the Advisors, and oversight from the Council – and does so in a way that is specifically tailored to the nature of the proposed investments and underlying technologies.<sup>41</sup> For example, ENO submitted a proposal in the 2018 Rate Case for regulatory oversight of, and public input on, ENO’s planned investment in Grid Modernization. As described more fully in that filing and the testimony of Erica Zimmerer, the proposed framework would involve detailed, public-facing, review of the design, budgets, scope, and benefits of each proposed Grid Modernization project prior to ENO’s commencement on construction of any such project. ENO’s proposal also provides for a process through which these same stakeholders would have a transparent view into the recovery of investments in Grid Modernization through the annual administration of the proposed Distribution Grid Modernization Rider. ENO’s proposed process would provide this level of transparency while still ensuring that ENO can execute on its and the Council’s shared vision of expeditiously modernizing New Orleans’ distribution grid.<sup>42</sup> ENO developed this proposed process thoughtfully with the Council’s goal related to Grid Modernization, and the need for public input and transparency, specifically in mind. In contrast, rules adopted in this proceeding are being developed specifically for RFPs for generating resources and PPAs and would not be a good fit for the technologies involved with, or the Council’s specific goals for, Grid Modernization or any other emerging technologies.<sup>43</sup> As such, the AAE’s proposal to apply rules adopted in this proceeding to investments in DSM, Grid Modernization, distribution

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<sup>41</sup> ENO notes that the proposed regulatory frameworks pending before the Council are just that – proposals. ENO hopes that the Advisors, Council, and stakeholders will seriously consider ENO’s proposals and provide constructive feedback if they believe these proposals can be improved upon.

<sup>42</sup> See Resolution No. R-18-36.

<sup>43</sup> The Council has already established a process specifically tailored to overseeing ENO’s investments in DSM. The 2018 Base Rate Case also contains a proposal geared toward improving that process and establishing a framework that would treat DSM resources like traditional supply-side resources.

reliability, DERS, and other emerging technologies lacks any basis in law or fact, and would not benefit ENO's customers or further the Council's policy goals.

#### **IV. Conclusion**

ENO believes that the Council can and should adopt rules that establish a process through which ENO's resource procurement activities are supervised and subjected to Council and stakeholder review and input. ENO is encouraged by the many suggestions from Intervenors that seek to establish a flexible and adaptive framework for communication and collaboration for future RFPs. However, ENO believes that customers will not benefit from rigid substantive rules that may not be well suited to a given situation or industry changes triggered by the rapid evolution of technology. ENO hopes that the Council hears ENO's concerns in this regard and will create rules that allow for incorporation of adaptability, creativity, and the benefits of ENO's technical expertise into future resource planning decisions.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

**Docket No. UD-18-05**

I hereby certify that I have served the required number of copies of the foregoing report upon all other known parties of this proceeding, by the following: electronic mail, facsimile, overnight mail, hand delivery, and/or United States Postal Service, postage prepaid.

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